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THE BOARD OF CONTROL OF DEWAN BAHASA DAN PUSTAKA v. DAWAMA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN J
[ORIGINATING SUMMONS NO: WA-24NCC(ARB)-11-03-2018]
B 11 DECEMBER 2020

ARBITRATION: *Award – Setting aside – Application to set aside entire final award or alternatively, part of final award – Whether there was 'new difference' in findings – Whether questions of law raised – Whether there were merits in questions*
C *raised – Arbitration Act 2005, ss. 37 & 42 – Rules of Court 2012, O. 69 rr. 2, 4, 5 & 6*

The plaintiff, the Board of Control of Dewan Bahasa dan Pustaka ('DBP'), applied to quash the entire part of the final award of the arbitrator which was made in favour of the defendant, Dawama Sdn Bhd ('Dawama') pursuant to
D ss. 37 and 42 of the Arbitration Act 2005 ('Act') and/or O. 69 rr. 2, 4, 5 and/or 6 of the Rules of Court 2012 or the inherent jurisdiction of the court. *Vide* a concession agreement ('CA') with a view of privatising its pre-press, design, type-setting, printing, distribution and marketing activities ('prescribed activities'), DBP awarded a 12-year concession to Dawama.
E Under the CA, Dawama would take over, operate, manage and maintain at its own costs and expenses, the prescribed activities in relation to (i) free textbooks provided to primary and secondary school students under the 'Buku Teks Skim Pinjaman' scheme set up by the Government ('BTSP'); (ii) all textbooks other than BTSP and 'General Titles' for direct sale to the
F public ('open market') (BTSP and open market to collectively be referred to as 'textbooks'); and (iii) books and/or magazines published by DPB other than the Textbooks ('General Titles'), in hard and soft copies, diskettes, CD-ROM, DVD, software, internet and other similar medium ('publications'). Pursuant to the CA and throughout the concession period, DBP placed two
G main orders of textbooks with Dawama. The orders were: (i) reprinting of existing textbooks ('reprint orders'); and (ii) new textbook titles ('new title orders') (collectively referred to as 'BTSP orders'). DBP then placed the 2015 reprint orders together with orders for an activity book titles 'Pendidikan Keselamatan Jalan Raya' ('PKJR'). A dispute arose between
H DBP and Dawama and pursuant to cl. 26.4 of the CA, a reference to arbitration was made. In this originating summons, DBP sought to challenge: (i) the award of the sums RM5,074,217.72 and RM1,712,610 to Dawama; and (ii) that DBP was not awarded the claim for replacement textbooks for 2015 reprint orders amounting to RM196,273.40.

I DBP sought to move the court to, *inter alia*, (i) set aside the final award; (ii) in the alternative, set aside paras. 496(d) and 679(vii) of the final award; and (iii) to refer 14 questions of law arising out of the final award which allegedly, substantially affected the rights of DBP. However, during the

hearing of the originating summons, questions 2, 3, 8 and 10 were abandoned and the rest of the questions were maintained. The questions were whether the arbitrator erred in law in (i) making the final award of RM4,243,949.72 ('question 1'); (ii) applying the *de minimis* principle in dismissing the discrepancy in Dawama's proof of 50,000 PKJR textbooks that it allegedly printed ('question 4'); (c) holding that DBP had the duty/burden of proof in challenging the quantity and quality of the 2015 PKJR orders allegedly printed and stored by Dawama ('question 5'); (iv) applying the principles of mitigation of damages to determine whether Dawama took reasonable steps in mitigating its losses in relation to the PKJR textbooks ('question 6'); (v) not applying the principle of mitigation of damages in awarding the sum of RM870,000 for the storage costs ('question 7'); (vi) not determining when the breach occurred in relation to the 2015 PKJR orders and when Dawama's duty to mitigate its damage arose ('question 9'); (vii) failing to determine that as there was no breach by DBP by not placing the 2015 new title orders with Dawama, Dawama was not entitled to damages ('question 11'); (viii) applying the law on *quantum meruit* when he awarded the sum of RM1,712,610 for the forfeited deposit for paper to Dawama ('question 12'); (ix) when he awarded the sum of RM1,712,610 for the forfeited deposit when it was not pleaded by Dawama nor argued by the parties ('question 13'); and (x) dismissing DBP's claim for RM196,273.40 by considering the evidence and submissions relating to the principles of mitigation instead of the evidence relevant to proving the claim ('question 14').

Held (dismissing originating summons):

(1) DBP was seeking to set aside the entire final award and in the alternative, to set aside part of the final award, namely paras. 496(d) and 679(vii), contending that the award contained 'decisions on matters beyond the scope of the submission to arbitration' which attracted the application of s. 37(1)(a)(v) and consequently s. 37(3) of the Act. To succeed in wanting to set aside part of an award, it is incumbent on the party seeking to set aside part of the award to show whether there is a 'new difference' in the findings made by the tribunal. Therefore, DBP had to demonstrate if the 'new difference' existed. (paras 8, 10, 13 & 15)

(2) The arbitrator arrived at the finding that Dawama was entitled to the deposit sum as the said deposit was made as early as in April 2014. At that time, the pre-press works were being carried out by Dawama despite nothing being agreed between the parties as to whether the CA was being extended. Both parties were performing their bargain under the existing CA. Therefore, it was not wrong for the arbitrator to arrive at a factual finding that Dawama incurred the loss of the deposit after the CA was not extended. Such a conclusion was arrived at by the arbitrator on a deduction he carried out based on the facts. (para 21)

(3) The issue of placing orders for papers was raised by Dawama. However, DBP had failed to reply to the submissions of Dawama. The failure to respond over the issue could not be the fault of the arbitrator as DBP was never denied the right to submit on the issue. As such there was no breach of natural justice. Even if there was a breach of natural justice, the law was clear. It was not an automatic consequence that an award was to be set aside. (paras 24 & 25)

(4) DBP failed to prove there was a 'new difference' to entitle the court to alter part of the final award by setting aside paras. 496(d) and 679. The deposit sum on the basis of *quantum meruit* was clearly within the 'scope of the submission to arbitration'. It was also a pleaded claim which was supported by evidence and rightly analysed by the arbitrator. There was no basis to interfere with the findings of the arbitrator for a challenge under s. 37 of the Act. (paras 26 & 27)

(5) Any challenge under s. 42 of the Act must be done on the basis of a full and unqualified acceptance of the findings of facts of the arbitrator. The questions under s. 42 could not be mixed questions of fact and law. A factual question could not be guised or dressed up as a question of law. So long as the arbitrator considered the issue raised and assessed it to the facts of the case, his finding ought not to be disturbed or reversed even if the outcome of the award was perverse. The majority of the questions posed by DBP were questions of fact and law. No questions of law were involved in questions 1, 6, 7, 11, 12 and 13 and as such, these questions merited no consideration. There was no merit in questions 4 and 5 for consideration. As for question 9, the arbitrator was not obliged to address all points of submissions. It was not the duty of the arbitrator to slavishly adopt the position advocated by one party or the other. Merely by failing to consider an argument could not mean that there was a question of law that merited a s. 42 reference. Question 14 did not lead to any issues that would vitiate the findings of the arbitrator. (paras 28-30, 34, 39, 46, 53, 57, 61, 63, 67, 70, 75, 81)

(6) DBP failed on both grounds of challenges. There was no issue of whether the final award should be set aside in entirety. Neither should the final award be set aside in part. Clearly, DBP was nitpicking and looking for inconsistencies and faults in the award. Such an approach is discouraged as a court should read the award in a reasonable and commercial way. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the Act which for all intents and purposes is to promote a one-stop adjudication in line with the international practice. The court needs to recognise the autonomy of the arbitral process by encouraging finality and its advantage as an efficient alternative dispute resolution process should not be undermined. (paras 82-84)

Case(s) referred to:

AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal [2013] 2 CLJ 395 CA ***(refd)***

Awangku Dewa Pgn Momin & Ors v. Superintendent Of Lands And Surveys, Limbang Division [2015] 3 CLJ 1 CA ***(refd)***

Boon & Cheah Steel Pipes Sdn Bhd v. Asia Insurance Co Ltd & Ors [1972] 1 LNS 14 HC ***(refd)***

Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Garden Bay Sdn Bhd v. Sime Darby Property Bhd [2018] 6 CLJ 199 CA ***(refd)***

Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC ***(refd)***

Kabatasan Timber Extraction Company v. Chong Fah Shing [1969] 1 LNS 63 FC ***(refd)***

Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***

Keruntum Sdn Bhd v. The Director Of Forests & Ors [2017] 4 CLJ 676 FC ***(refd)***

Lesotho Highlands Development Authority v. Impregilo SpA And Others [2005] UKHL 43 ***(refd)***

Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***

Margaronis Navigation Agency, Ltd v. Henry W Peabody & Co, Of London, Ltd [1964] 2 QB 430 ***(refd)***

Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd & Another Appeal [2020] 9 CLJ 466 FC ***(refd)***

Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd [2007] 3 CLJ 185 CA ***(refd)***

Primera Maritime (Hellas) Ltd v. Jiangsu Eastern Heavy Industry Co Ltd [2013] 2 CLC 901 ***(refd)***

Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd [2018] 8 CLJ 291 CA ***(refd)***

Soh Beng Tee & Co Pte Ltd v. Fairmont Development Pte Ltd [2007] 3 SLR 86 ***(refd)***

Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***

Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic [2017] 9 CLJ 273 FC ***(refd)***

Tridant Engineering (M) Sdn Bhd v. Ssangyong Engineering & Construction Co Ltd [2017] 2 CLJ 393 CA ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 8, 9, 37(1)(a)(v), (b)(ii), (2)(b), (3), 42(1), (1A), (2), (3), (4)

Rules of Court 2012, O. 69 rr. 2, 4, 5, 6

For the plaintiff - Alan Adrian Gomez & Michael Yap Chih Hong; M/s Tommy Thomas
For the defendant - Siva Kumar Kanagasabai & Corrinne Chin; M/s Skrine

Reported by Lina E

JUDGMENT

Ahmad Fairuz Zainol Abidin J:

Introduction

[1] The plaintiff, the Board of Control of Dewan Bahasa dan Pustaka ("DBP") applied to quash the entire or part of the final award dated 12 February 2018 of the learned arbitrator ("the final award") which was made in favour of the defendant, Dawama Sdn Bhd ("Dawama") pursuant to s. 37 and s. 42 of the Arbitration Act 2005 ("the Act") and/or O. 69 rr. 2, 4, 5 and/or 6 of the Rules of Court 2012 or the inherent jurisdiction of this court. This court dismissed the application and affirmed the findings of the learned arbitrator.

Background

[2] The background facts have been set out in the award as well as the submissions by both DBP and Dawama. This court adopts the salient facts as follows:

(i) *Vide* a concession agreement dated 19 June 2002 ("the CA"), with a view of privatising its pre-press, design, type-setting, printing, distribution and marketing activities ("prescribed activities"), DBP awarded a 12-year concession to Dawama. Under the agreement, from 1 September 2002 to 31 August 2014, Dawama would take over, operate, manage and maintain at its own costs and expense, the prescribed activities in relation to:

(a) free textbooks provided to primary and secondary school students under "Buku Teks Skim Pinjaman" scheme set up by Government ("BTSP");

(b) all textbooks other than BTSP and the general titles for direct sale to the public ("open market") (BTSP and open market to be collectively referred to as "textbooks"); and

(c) books and/or magazines published by DBP other than the textbooks ("general titles").

In hard copy, soft copy, diskettes, CD-ROM, DVD software, internet and other similar medium (collectively referred to as "the publications").

(ii) Pursuant to the CA and throughout the concession period, DBP placed two main orders of textbooks with Dawama. The orders are as follows:

(a) reprinting of existing textbooks ("reprint orders"); and

(b) new textbook titles ("new title orders").

(Both orders will be collectively referred to as "BTSP orders").

(iii) On 26 June 2014, DBP placed the 2015 reprint orders together with orders for an activity book titled "Pendidikan Keselamatan Jalan Raya" ("PKJR"). A

(iv) A dispute arose between DBP and Dawama. Pursuant to cl. 26.4 of the CA, a reference to arbitration was made. The learned arbitrator issued the final award on 12 February 2018. B

The Originating Summons

[3] DBP sought to move this court to, *inter alia*:

(i) set aside the final award of the learned arbitrator, Dato' Murelidaran M Navaratnam dated 12 February 2018; C

(ii) in the alternative to (i) above, to set aside paras. 496(d) and 679(vii) of the final award; and

(iii) to refer 14 questions of law arising out of the final award which allegedly substantially affects the rights of DBP. D

[4] In essence, DBP seeks to challenge the final award under s. 37 and s. 42 of the Act. The head of challenges are:

(i) the award of the sum RM5,074,217.72 to Dawama for 2015 PKJR orders and PKJR storage charges after deducting proceeds of sale of scrapped paper which can be seen in paras. 410 to 460 of the final award; E

(ii) the award of the sum RM1,712,610 to Dawama for forfeited deposit by Mulberry paper ("the deposit sum") awarded within the head of claim for 2015 new title orders which can be seen in paras. 496(d) and 679(1)(vii) of the final award; and F

(iii) that DBP was not awarded the claim for replacement textbooks for 2015 reprint orders amounting to RM196,273.40 which can be seen in paras. 633 to 661 of the final award. G

Analysis

[5] Courts do not exercise appellate jurisdiction over arbitration awards (see *Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd* [2007] 3 CLJ 185; [2007] 4 MLJ 113). The only provisions in the Act that provide for the setting aside of domestic awards are s. 37 and s. 42(1) to (4) of the Act. H

The Section 37 Challenge

[6] Section 37 of the Act provides for the instances when the court may intervene to set aside an arbitration award:

37. Application for setting aside I

(1) **An award may be set aside by the High Court only if**:

A (a) the party making the application provides proof that:

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication B thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

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(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

D (vi) the composition of the arbitral tribunal or the arbitral procedure was riot in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

E (b) **the High Court finds that:**

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) **the award is in conflict with the public policy of Malaysia**.

F (2) **Without limiting the generality of subparagraph (1)(b)(ii)**, a**n award is in conflict with the public policy of Malaysia where**:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) **a breach of the rules of natural justice occurred**:

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(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award H which contains decisions on matters not submitted to arbitration may be set aside.

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made I under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside. (emphasis added)

[7] DBP's application to set aside the final award is premised on s. 37(1)(b)(ii) and (2)(b) of the Act. Alternatively, premised on s. 37(1)(a)(v) and s. 37(3) of the Act, DBP seeks to set aside paras. 496(d) and 679(vii) of the final award which allows Dawama's claim for the deposit sum.

Setting Aside The Entire Award – Section 37(b)(ii) Read With Section 37(2)(b)

[8] DBP is seeking to set aside the entire final award.

[9] In *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2018] 8 CLJ 291, the Court of Appeal held that the whole of the award can be set aside where a breach within the terms of s. 37(b)(ii) read with s. 37(2)(b) of the Act has been established. It held as follows:

[34] Fourth, where such a breach within the terms of s. 37(1)(b)(ii) read with s. 37(2)(b) has been established, it is the whole award that will be set aside. The terms of s. 37 do not appear to allow for the operation of the principle of severance, especially in view of the terms of s. 37(3) read with s. 37(1)(a)(v). Subsection 37(3) provides that where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside. The words "matters submitted to arbitration can be separated from those not so submitted" are peculiar to the terms appearing in s. 37(1)(a)(v), the only provision which makes specific reference to s. 37(3), that it is read "subject to sub-s. (3)" ...

[35] This issue was discussed at the first instance in *Ahmani Sdn Bhd v. Petronas Penapisan (Melaka) Sdn Bhd & Other Cases* [2015] 9 CLJ 782 and implicitly endorsed by the Court of Appeal subsequently on appeal - see *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd* [2016] 3 CLJ 403. *This brings the necessary conclusion that where the award conflicts with the public policy of Malaysia (where there is a breach of the rules of natural justice), it is the whole award which will be set aside, and not only a suggested part of the award.*

(emphasis added)

Setting Aside Part Of An Award – Section 37(1)(a)(v) And Section 37(3)

[10] DBP is also seeking in the alternative, to set aside part of the final award namely paras. 496(d) and 679(vii) as DBP contends that the award "contains decisions on matters beyond the scope of the submission to arbitration" which attracts the application of s. 37(1)(a)(v) and consequently s. 37(3) of the Act.

[11] As to when the court can set aside part of an award, it was established in the Federal Court decision of *Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic* [2017] 9 CLJ 273 as follows:

> In relation to "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration" and "the award contains decisions on matters beyond the scope of the submission to arbitration", *William & Kawharu supra* at 17.5.4 thus commented on the first limb of art. 34(2)(a)(iii) of the NZ Arbitration Act (the equivalent of s. 37(1)(a)(iv) and (v) of the AA 2005):
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> > This ground for setting aside is directed at situations in which a tribunal has jurisdiction under a valid arbitration agreement, but has exceeded the authority by dealing in the award with matters that go beyond the terms of the arbitration agreement or the scope of the issues referred by the parties for resolution ... *The tribunal also has an obligation to take particular care to keep within the confines of these matters that the parties have plainly put in issue ... If the tribunal exceeds its authority in respect of some matters only, and its decisions on those matters are severable from decisions on matters made within the submission to arbitration, the High Court may only set those parts of the award containing the decisions on matters not submitted to arbitration.*
>
> *Section 37(3) of the AA 2005 correspondingly provides "Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside* ... when an issue is clearly put before the tribunal there is no excess of authority if the tribunal applies its own view of the law in respect of that issue ...
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> (emphasis added)

[12] The Court of Appeal decision in *Garden Bay Sdn Bhd v. Sime Darby Property Bhd* [2018] 6 CLJ 199; [2018] 2 MLJ 636 dealt with severability to set aside part of an award. It held as follows:

> [19] Malaysia has adopted art. 34(4) and is reflected in art. 37(6). *In addition, Malaysia has included a sub-provision for the court to separate part of the award, thereby accepting the doctrine of separability and/or severability to set aside a part of the award only and is reflected in s. 37(3).* The doctrine of severability was already in place by development of case laws under the old regime. If the award can be severed to save the integrity of the decision-making process, the courts have readily done so. However, if the award is inextricably interwoven with the jurisdictional issue and cannot be severed without violence to the jurisdictional principles and/or quantum, the courts have refused to exercise its discretion ...

> [20] *Severability will be applicable to a complaint, for example, under s. 37(1)(a)(v) where the attack is only against part of the award …*
>
> (emphasis added)

[13] To succeed in wanting to set aside part of an award, it is incumbent on the party seeking to set aside part of the award to show whether there is a "new difference" in the findings made by the tribunal.

[14] As to what a "new difference" means can be seen in the passage of the judgment of the Court of Appeal in *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617:

> [22] The learned High Court Judge considered the background facts in some detail. Her Ladyship also evaluated the issues formulated by the arbitrator, as agreed and modified by both parties. *Her Ladyship considered the detailed finding of the arbitrator, which was quoted in extenso, but concluded that the arbitrator had decided on a dispute which was not contemplated by, or not falling within the terms of the submission to arbitration. This is an area of arbitration law which allows the court to set aside an award on the ground that an arbitrator had decided on a "new difference" which is irrelevant to the claim, the "new difference" being understood as a new dispute not contemplated by or not falling within the terms of the arbitration submission*. The underlying rationale for this rule rests on the consensual nature of arbitration. Parties are not compelled to resort to arbitration contractually, but if they provide for it and refer their dispute to arbitration, *the mandate of the arbitrator must be limited to the terms defined by the parties for him to exercise his jurisdiction. If the arbitrator strays from the confines of this mandate, he will be acting in excess of his jurisdiction*, even though he may have the initial and primary jurisdiction to arbitrate between the parties. This rationale is stated succinctly by the Court of Appeal, Singapore in *PT Prima International Development v. Kempinski Hotel SA & Other Appeals* [2012] SGCA 35:
>
> > *An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without the consent of the other party*. These propositions flow inexorably from the consensual nature of arbitration.
>
> (emphasis added)

[15] Therefore, DBP has to demonstrate to this court if the "new difference" existed.

Breach Of Natural Justice

[16] DBP contended that there was a breach of natural justice when the arbitrator made a ruling on matters that were never submitted and/or beyond the scope of submission by the parties.

[17] The impugned finding according to DBP was made by the arbitrator at para. 496(d) of the final award. It reads as follows:

(d) I also find that the deposit sum of RM1,712,610.00 forfeited by Mulberry Paper have been proven by Dawama. The said order was placed way back in April 2014 when Dawama was still carrying out the Prescribed Activities and the pre-press works as instructed by DBP. DBP did not instruct Dawama to stop all works at this point in time in view of the expiry of the Concession Agreement on 31 August 2014. It is only reasonable for Dawama to place such orders so that even if the Prescribed Activities are taken over by DBP, it would be able to make use of these orders and not seek to place fresh orders for papers then. I also accept the documents relied on by Dawama in support of this claim.

[18] It was argued by DBP the conclusion arrived at by the arbitrator on his own and was not based on any submissions. Had the opportunity been given to DBP, it would have been able to submit on the following issues:

(i) DBP did not instruct Dawama to stop all works at this point in time in view of the expiry of the concession agreement on 31 August 2014; and

(ii) that it is reasonable for Dawama to place such orders so that even if the prescribed activities are taken over by DBP, it would be able to make use of these orders and not seek to place fresh order for papers.

Whether There Was A Breach Of Natural Justice

[19] The law on breach of natural justice *vis-á-vis* a s. 37 challenge is settled. In *Sigur Ros (supra)*, the Court of Appeal held that the courts have a wide discretion on whether to set aside an award when there has been a breach of the rules of natural justice. The court held:

[63] Because s. 37 vests the court with a wide discretion on whether to set aside an award, we agree with the learned JC that the decision to set aside an award is not an automatic outcome of a finding that there has been a breach of the rules of natural justice. The court will still have to evaluate whether discretion should be exercised in the applicant's favour. *In considering whether discretion should be exercised, there should be an evaluation of relevant factors such as those identified in Kyburn Investments Ltd v. Beca Corporate Holdings Ltd, amongst which would be to consider the seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration; leaving room for "casual breach or occasional error". Costs of rehearing and delay in raising the complaint are further relevant factors to be taken into account in that evaluation. This exercise is different from undertaking an exercise to show prejudice, which may be in several respects, including monetary rights*.

(emphasis added)

(See also *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395).

[20] As to what amounts to natural justice, VK Rajah JA's guidance in the Singapore Court of Appeal case of *Soh Beng Tee & Co Pte Ltd v. Fairmont Development Pte Ltd* [2007] 3 SLR 86 is instructive. His Lordship laid down

the principle that in cases involving a claim of a breach of the rules of natural justice, the arbitrating party making the claim must demonstrate that the breach of the rules of natural justice has caused it actual or real prejudice. A

[21] It is clear to this court that the arbitrator arrived at the finding that Dawama was entitled to the deposit sum as the said deposit was made as early as in April 2014. At that time, the pre-press works were being carried out by Dawama despite nothing being agreed between parties as to whether the CA was being extended. Both parties were performing their bargain under the existing CA. Therefore, it was not wrong for the arbitrator to arrive at a factual finding that Dawama incurred the loss of the deposit after the CA was not extended. Such a conclusion was arrived at by the Arbitrator on a deduction he carried out based on the facts. B C

[22] This court is of the view that the deposit was incurred by Dawama as a result of the pre-press work for the 2015 new title orders. This was the conclusion arrived at by the arbitrator at para. 469(d) of the final award. Whether Dawama was entitled to the 2015 new title orders is separate from whether Dawama is entitled to claim the deposit sum on the basis of *quantum meruit*. D

[23] However, it was highlighted to this court by counsel for Dawama that the issue was raised during Dawama's submissions at the arbitration proceedings. It was highlighted that the submissions "Had DBP not made those representations to Dawama, and instead clearly stated that it was not going to place the 2015 new title orders with Dawama at the outset, Dawama would not have placed the orders for the paper for the 2015 new title orders" were made. The submissions were annexed as an exhibit marked "A-7(d)", vol. XI of DBP. E F

[24] It is clear to this court that the issue of placing orders for the paper was raised by Dawama. However, DBP failed to reply the submissions of Dawama. The failure to respond over the issue cannot be the fault of the arbitrator as DBP was never denied the right to submit on the issue. As such, there is no breach of natural justice as contended by DBP. G

[25] Even if there was a breach of natural justice in the above scenario, the law is clear. It is not an automatic consequence that an award is to be set aside (see *Sigur Ros* (*supra).*

[26] DBP has also failed to prove there was a "new difference" as expounded in *Perwira Bintang* (*supra)* to entitle this court to alter part of the final award by setting aside paras. 496(d) and 679. This court finds that the deposit sum on the basis of *quantum meruit* is clearly within the "scope of the submission to arbitration". It was also a pleaded claim which was supported by evidence and rightly analysed by the arbitrator. H I

[27] With the view of minimal judicial intervention in arbitration proceedings adopted by Malaysian courts and the great latitude given to arbitrators in the conduct of arbitral proceedings, there is no basis to interfere with the findings of the arbitrator for a challenge under s. 37 of the Act.

Section 42 Questions

[28] At the onset, any challenge under s. 42 must be done on the basis of a full and unqualified acceptance of the findings of facts of the arbitrator. It is useful to recap the principle which governs a s. 42 challenge. In *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693, the Federal Court outlined the following principles to be observed by court when entertaining a s. 42 application. It held as follows:

> *[153] Where it is a question of fact, "The arbitrators (remain) the masters of the facts. On an appeal the court must decide any questions of law arising from the award on the basis of full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers these findings to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of the financial correspondences of the mistake of fact might be.* That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. *Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact." (the 'Baleares' at 228). "... on findings of facts an arbitrator is the sole judge. Further, whether he drew the wrong inferences of facts from the evidence itself is not sufficient as a ground to warrant setting aside his award* (see *GKN Centrax Gears Ltd v. Matbro Ltd* [1976] 2 Lloyd's Rep 555)" (*Future Heritage Sdn Bhd v. Intelek Timur Sdn Bhd* [2003] 1 CLJ 103; [2003] 1 MLJ 49 per Richard Malanjum JCA, as he then was). "... if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient to warrant setting aside of his award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood' per Raja Azlan Shah J (as he then was) in *Syarikat Pemborong Pertanian & Perumahan v. Federal Law Development* [1971] 2 MLJ 210" (*Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743; [2004] 1 MLJ 401 per Siti Norma Yaakob FCJ, as she then was, delivering the judgment of the court).
>
> [154] "It is essential therefore to understand the basic difference between appeals in the court system from subordinate courts, where issues of 'weight of evidence' are routinely addressed, and *references under s. 42 of the Act, where the court has no jurisdiction to entertain arguments based on weight of evidence ... 'the parties will not be allowed to circumvent the rule that the tribunal's findings of fact are conclusive by alleging that they are inconsistent or they constitute a serious irregularity or an excess of jurisdiction, or on the basis that there was insufficient evidence to support the findings in question. The argument that it is a*

question of law whether there is material to support a finding of fact is no longer available' (*Russell on Arbitration* (1997) at 8-057)'' (The Arbitration Act 2005 *supra* at pp. 198-199).

[155] At any rate, *s. 42 only permits a reference on a discrete question of law. Under s. 42, there is no jurisdiction to deal with questions of fact. As Steyn LJ put it in The Baleares, "on an appeal the court must decide any question of law arising from the award based on a full and unqualified acceptance of the findings of fact of the arbitrators". The question of law must accept the findings of facts. Hence, all argument or debate on the findings of fact of the arbitrator, on the inferences drawn by the arbitrator from his findings …*

(emphasis added)

[29] The questions under s. 42 cannot be mixed questions of fact and law. A factual question cannot be guised or dressed up as a question of law (see *Tridant Engineering (M) Sdn Bhd v. Ssangyong Engineering & Construction Co Ltd* [2017] 2 CLJ 393; and *Awangku Dewa Pgn Momin & Ors v. Superintendent Of Lands And Surveys, Limbang Division* [2015] 3 CLJ 1).

[30] So long as the arbitrator considered the issue raised and assessed it to the facts of the case, his finding ought not be disturbed or reversed even if the outcome of the award was perverse (see *Far East (supra)*). Such is the deference given to party autonomy which is meant to respect the common stand of parties in surrendering their dispute to an arbitral tribunal.

[31] The consequence of placing such approbation must mean that any review of an award is restricted. If judicial intervention is allowed liberally, party autonomy would be ineffectual and the finality and independence of the arbitral award is not guaranteed.

[32] This court would be failing in its duty if failed to remind itself of the recent Federal Court decision in *Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd & Another Appeal* [2020] 9 CLJ 466 where in no undertrain terms, the principle of minimal interference by the court was re-emphasised. Abdul Rahman Sebli FCJ summarised the position in law as follows:

Section 8 of the **Act enshrines the principle of minimal interference by the court**, which is an ingrained aspect of the United Nations Commission on International Trade Law (UNCITRAL) Model on International Commercial Arbitration: See *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617; [2015] 6 MLJ 126 CA which was cited with approval by this court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ 1.

(emphasis added)

[33] Prior to *Pancaran Prima* (*supra*), another Federal Court case of *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1; [2019] 2 MLJ 413 also ruled on the effect of minimal intervention and referred to the effect of ss. 8, 9, 37 and 42 of the Act. It held as follows:

A The effect of ss. 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice. (see: *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn* B *Bhd & Another Appeal* [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83; and *Lesotho Highland Development Authority v. Imprigelo SpA 476* [2005] UKHL 43). In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined.

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[34] It is the finding of this court that the majority of the questions posed by DBP are questions of fact and law. This genre of questions had categorically identified by the Federal Court in *Far East* (*supra*) as not being entitled for consideration under a s. 42 challenge.

D **[35]** In challenging the award under s. 42 of the Act, DBP originally posed 14 questions for this court's determination. However, during the hearing of this originating summons, counsel for DBP informed the court that Questions 2, 3, 8 and 10 would be abandoned. The rest of the questions were maintained.

E **[36]** This court will deal with the questions *seriatim*.

Question 1: Whether The Arbitrator Erred In Law In Making The Final Award Of RM4,243,949.72 By Applying The Price Of The PKJR Textbooks That Had Been Determined Under The F Expired CA, Which Price Included The Requirement Of Delivery Of The PKJR Textbooks To The Schools, As Being The Price That Had Been Agreed In Advance For The PKJR Textbooks Including For 2,209,710 PKJR Textbooks That Had Been Delivered To The Schools

G **[37]** This is a question that relates to the express finding by the arbitrator that there was no re-negotiation of the price of the PKJR textbooks required as the price had already been agreed upon upfront as contained in the CA. The arbitrator had made an express finding of fact as seen from paras. 451 and 452 of the final award. For instance, there was a finding by the arbitrator H that the price of the PKJR textbooks had been agreed upon which resulted in Dawama delivering the books to Sabah, Sarawak, Labuan and Machang.

[38] There was no need for DBP to renegotiate the price for the remaining textbooks as it had already been agreed in advance. Such a finding of fact was also aided by the admission of DBP's Timbalan Ketua Pengarah's testimony I Encik Kamarul. The witness had agreed to the suggestion "... Encik Kamarul dah setuju bahawa tiada sebab untuk merunding harga untuk buku-buku tersebut yang telah dihantar ..." in which he answered "Tiada sebab kerana harga buku tersebut telah pun disetujui".

[39] As to whether the arbitrator was wrong in including the price which included delivery of the books, it is the finding of this court that the arbitrator had actually deducted the distribution fee for the PKJR textbooks that were not delivered to the schools in West Malaysia totalling the sum RM431,500.08. This can be seen at para. 457 of the final award. Clearly, it was a factual assessment by the arbitrator which resulted in the deduction of the distribution fee. As such, Question 1 is not a question of law.

Question 4: Whether The Arbitrator Erred In Law In Applying The De Minimis Principle In Dismissing The Discrepancy In Dawama's Proof Of 50,000 PKJR Textbooks That It Had Allegedly Printed

[40] When considering the *de minimis* principle, it must relate to the facts of the case itself. Only then can the arbitrator arrive at such a conclusion of what is *de minimis* or otherwise.

[41] It is useful to recall that *de minimis* is an abbreviated form of the Latin maxim *de minimis non curat lex*, "the law cares not for small things". It is a legal doctrine by which a court or tribunal refuses to consider trifling matters. The *de minimis* doctrine is applied to avoid the resolution of trivial matters that are not worthy of judicial scrutiny.

[42] In the case of *Margaronis Navigation Agency, Ltd v. Henry W Peabody & Co, Of London, Ltd* [1964] 2 QB 430, the English Court of Appeal upheld the finding of the arbitrator and the High Court in recognising the award of the arbitration. The Court of Appeal speaking through Sellers J held that there is very little law involved when applying and considering the *de minimis* rule. This is because when determining whether precise accuracy could be obtained or whether there were limits of accuracy which were commercially reasonable or which were not commercially significant is a question of fact.

[43] Sellers J held as follows:

> It may be said that on the construction of this contract when it was entered into it would be on the basis that any negligible variation from the 12,600 tons, if that was the quantity which ultimately could be taken within "a full and complete cargo", would be subject to the *de minimis* rule. *Then when the rule came to be applied it was a matter of fact whether, in all the circumstances, precise accuracy could be obtained (as I think it might well have been here) or whether there were limits of accuracy which were commercially reasonable or (as the argument for the owners would have it) which were not commercially significant*.
>
> *There is, I think, very little law involved in a decision on an issue such as that*. But the judge, I think rightly, said that it is a matter in which a court might, having regard to the authorities (some fairly recent in this court), interfere, because it is a mixed question of fact and law. But substantially, and particularly *when we come to consider in this court whether we would interfere, it*

is a matter of fact whether, on the basis that there is this shortage below the agreed figure of 12,600 tons, that is so negligible in the circumstances of the case, having regard to all the factors, that it ought to have been ignored.

(emphasis added)

[44] Pearson J in supporting the decision held as follows:

Once it is appreciated what the test is, namely, whether the de minimis rule applies or not, whether the departure from the precise terms of the obligation is so trivial as to be negligible or whether it has some significance, then the rest becomes a pure question of fact. There is no indication in the special case that the umpire failed to consider the right question or in any way misdirected himself in law. *Therefore I would consider that his finding of fact, being based manifestly on some evidence, ought to be upheld, and there is no other ground for disturbing it*. I agree with Roskill J's judgment, and I would agree that the appeal should be dismissed.

(emphasis added)

[45] Raja Azlan Shah J (as he then was) in *Boon Cheah Steel Pipes Sdn Bhd v. Asia Insurance Co Ltd & Ors* [1972] 1 LNS 14; [1973] 1 MLJ 101 applied the principles held in *Margaronis Navigation*. His Lordship held:

Those observations of the Court of Appeal do, I think, throw light on the scope of the rule and it would appear to indicate that **once it is appreciated whether the rule applies, then the rest becomes a pure question of fact**. In my judgment, 12 pipes measuring a total of 360 feet, weighing 36 tons, costing $14,400 and insured at $16,000, affect far too high a proportion of the whole consignment of 668 pipes to be capable of being dismissed as a matter *de minimis*.

It may well be that in the case of a single pipe or two out of the whole consignment, the rule would apply, but I fail to see how it is possible to hold that 12 pipes can be ignored or treated as trifling and to be brushed aside. I find therefore on the facts before me that a consignment of 668 pipes is not totally lost when 12 pipes making it up are not lost.

(emphasis added)

[46] Given that the arbitrator rejected the argument by DBP that "the numbers do not add up" at para. 441 of the final award, it must only mean that the arbitrator had accepted Dawama's numbers of the PKJR textbooks and the explanation on the inconsistencies. This is clearly a finding of facts that cannot be challenged under a s. 42 reference. Question 4 therefore merits no consideration.

Question 5: Whether The Arbitrator Erred In Law, In Holding That DBP Had The Duty/Burden Of Proof In Challenging The Quantity And Quality Of The 2015 PKJR Orders Allegedly Printed And Stored By Dawama By Asking Or Requesting That The Books Be Inspected

[47] It is the finding of this court that the arbitrator did not impose the burden of proof on DBP to challenge the quantity and quality of the 2015 PKJR textbooks that were printed by Dawama. An examination of the

undisputed facts shows the PKJR textbooks were placed by DBP. The arbitrator had at para. 443 of his final award found "the fact that DBP issued its sijil perakuan mutu for the PKJR textbooks shows that it was satisfied with the quality and specifications of the PKJR textbooks. This is the usual way DBP confirms the quality and specifications of the textbooks. It has never been the practice neither is it a requirement of the concession agreement that DBP inspects all the textbooks before it is distributed to the schools or to the various distributors".

[48] The arbitrator further found as a fact that Dawama had proven the quantity and quality of the PKJR textbooks stored at the warehouse. At paras. 442 and 443 of the final award, the arbitrator held as follows:

> [442] *I also find that the photographs and the videos* produced by Dawama to support its contention that the books were in fact PKJR books *to be acceptable*. There is no doubt as to when the photographs and the videos were taken as there were (*sic*) other evidence to support the contention.
>
> [443] Further, *the fact that DBP issued its Sijil Perakuan Mutu for the PKJR textbooks shows that it was satisfied with the quality and specifications of the PKJR textbooks*. This is the usual way DBP confirms the quality and specifications of the textbooks. It has never been the practice neither is it a requirement of the Concession Agreement that DBP inspects all the textbooks before it is distributed to the schools or to the various distributors.
>
> (emphasis added)

[49] Question 5 seems to highlight the phrase "... it is for DBP to challenge" and equates it as a duty imposed by the arbitrator on DBP to ascertain the quantity and quality of the books. However, the final award must be read in the sequence of the paragraphs. At para. 444 of the final award the arbitration held as follows:

> I find that it is for DBP to challenge the said contention by either asking or requesting that the books be inspected. DBP should have challenged Dawama regarding the quantity or quality of the textbooks that were being stored.

[50] Clearly, the arbitrator made the remarks after he was satisfied that Dawama had proven the quantity and quality of the books. A plain read of para. 444 does not leave any imposition of any duty on DBP to prove the quantity and quality of the books.

[51] The fact that DBP issued the sijil perakuan mutu to signify that they were satisfied with the quality of the books printed further lends weight to the arbitrator's finding. If at all an issue is taken with regards to the term "... it is for DBP to challenge", it only goes to shifting of the evidential burden to DBP after Dawama had successfully discharged its burden of proof. The principle of law was laid down by the Federal Court in the decision of *Keruntum Sdn Bhd v. The Director Of Forests & Ors* [2017] 4 CLJ 676; [2017] 3 MLJ 281.

A [78] It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. *Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party (see UN Pandey v. Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4). When the burden shifts to the other party. It can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving*
B *evidence himself or by a combination of the different methods*. See *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697.

[79] *The findings made by the learned trial judge are mainly findings of facts and he gave credible reasons for his findings. He had the benefit of hearing testimonies and observing the demeanour of the witnesses*. Those findings of facts were
C affirmed by the Court of Appeal. It would need very clear and convincing reasoning to justify us to reverse what has already been decided. We have looked at those findings of facts by the learned trial judge and the detail reasons given by him and we are satisfied that, on the facts of the case, any reasonable tribunal would have made similar findings.

(emphasis added)

D

[52] In demonstrating that he accepted Dawama's contention, the arbitrator remarked that DBP ought to have challenged Dawama on the issue during the proceedings. However, this was not done. This, to the mind of the arbitrator was the failing of DBP.

E **[53]** DBP had clearly taken the words "... it is for DBP to challenge the said contention by either asking or requesting that the books be inspected. DBP should have also challenged Dawama regarding the quantity or quality of the textbooks that were being stored" out of context. There is no merit in Question 5 for consideration as a s. 42 reference.

F Question 6: Whether The Arbitrator Correctly Applied The Principles Of Mitigation Of Damages In Determining Whether Dawama Took Reasonable Steps In Mitigating Its Losses In Relation To The PKJR Textbooks

[54] It is trite that the question of what is reasonable or whether the
G plaintiff has acted reasonably in mitigation of his damages in every case is a question of fact and not law (see *Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783; [1994] 3 MLJ 569 (SC); and *Kabatasan Timber Extraction Company v. Chong Fah Shing* [1969] 1 LNS 63; [1969] 2 MLJ 6 (FC)).

H **[55]** The arbitrator had addressed his mind to the defence of mitigation as pleaded by DBP. This can be seen in the final award between paras. 445 to 453. At para. 445, he held "I will now deal with the issue of mitigation". He then dealt with the exchange of letters between the parties.

I **[56]** It is to be noted that both parties adopted a hard-nosed approach in one way or the other during the dispute. The numerous exchange of letters on the inspection of the PKJR textbooks was an example of how both parties were adamant in insisting their respective positions.

[57] However, the arbitrator found in his award that "nothing unreasonable in Dawama not acceding to the request off DBP to inspect the said textbooks before proceeding with negotiations on the price as there was nothing to negotiate about". Such a conclusion was open to the arbitrator to consider on a totality of the evidence before him. Therefore, no question of law arises under Question 6 that merits consideration.

Question 7: Whether The Arbitrator Erred In Law In Not Applying The Principle Of Mitigation Of Damages In Awarding The Sum Of RM870,000 For The Storage Costs Of The 2015 PKJR Orders To Dawama For The Period From 3 October 2014 To 3 February 2017

[58] The question arose as a result of DBP's contention that Dawama ought to have mitigated its position by not incurring a RM30,000 per month rental for the storage of the remaining PKJR textbooks which were undelivered and stored at the warehouse. It was argued by DBP that Dawama did not take any steps to minimise the damage.

[59] At para. 444 of the final award, the arbitrator held "DBP should have made it clear that it does not require the books any longer as Dawama would not know that fact".

[60] During the proceedings before this court, counsel for Dawama highlighted that the first time Dawama got to know that DBP no longer had any use for the PKJR textbooks was only after DBP called its first witness to the stand during the arbitration proceedings some two and half years after the fact arose.

[61] It is the finding of this court that based on such a revelation by DBP's witness, clearly no mitigation steps could have been taken by Dawama for it never knew all these years that DBP no longer needed the books. More importantly, this by no stretch of imagination is a question of law hence, Question 7 merits no consideration by the court.

Question 9: Whether The Arbitrator Erred In Law In Not Determining When The Breach Occurred In Relation To The 2015 PKJR Orders And When Dawama's Duty To Mitigate Its Damage Arose

[62] This arose out of DBP's argument that the arbitrator had failed to accept DBP's argument "that if the duty to mitigate only arose on 2 December 2016 during cross-examination, Dawama's claim for the PKJR textbooks was premature and should be dismissed *in limine*".

[63] It is the position in law that the arbitrator is not obliged to address all points of submissions. It is not the duty of the arbitrator to slavishly adopt the position advocated by one party or the other. Merely by failing to consider an argument cannot mean that there is a question of law that merits a s. 42 reference (see *Soh Beng Tee & Co* (*supra)*).

[64] Be that as it may, on the facts too, it is clear that the obligation of DBP to pay Dawama dates back to 15 January 2015 as provided under cl. 14.2.2 of the CA. The admission of DBP's witness that they no longer required the books on 2 December 2016 during cross-examination does not assist DBP's argument that the claim was premature.

[65] Notwithstanding the above, the arbitrator did remark "there were no real challenges to the rental charges of RM30,000 per month from DBF" at para. 455 of the final award. It clearly meant that DBP failed to disprove Dawama's claim for storage costs.

Question 11: Whether The Arbitrator Erred In Law When He Failed To Determine That As There Was No Breach By DBP By Not Placing The 2015 New Title Orders With Dawama, Dawama Was Not Entitled To Damages When He Awarded The Sum Of RM1,712,610 For The Forfeited Deposit For Paper To Dawama

[66] This is a question that attempts to question if the Arbitrator had erred in law when allowing Dawama's claim for the deposit sum whilst at the same time, dismissing Dawama's primary claim for the 2015 new title orders.

[67] With respect, this is not a question of law. Instead, it is a finding arrived at by the arbitrator when he rightly distinguished between the right to sums due from work done under the principle of *quantum meruit* as opposed to an entitlement to the primary claim of the 2015 new title orders.

[68] As earlier discussed in this judgment, the arbitrator had awarded what he considered to the entitlement of Dawama to be paid for the costs incurred for the 2015 new title orders as well as the deposit sum for paper for the said 2015 new title orders under the alternative claim of *quantum meruit*.

[69] The fact that the arbitrator did not find Dawama to be entitled to the 2015 new title orders does not mean that Dawama was not entitled to its alternative claim of *quantum meruit* for works done for the 2015 new title orders.

[70] Therefore, there is no error of law involved which merits consideration.

Question 12: Whether The Arbitrator Erroneously Applied The Law On *Quantum Meruit* When He Awarded The Sum Of RM1,712,610 For The Forfeited Deposit For Paper To Dawama When It Was Unrelated To The Pre-press Work Undertaken By Dawama To Which The *Quantum Meruit* Claim Related

Question 13: Whether The Arbitrator Erred In Law When He Awarded The Sum Of RM1,712,610 For The Forfeited Deposit For Paper To Dawama On A *Quantum Meruit* Basis For Pre-Press Work When It Was Not Pleaded By Dawama Nor Argued By The Parties That Dawama Was Entitled To This Claim On The Basis Of *Quantum Meruit* For This Head Of Claim

[71] This court in considering the two questions is of the view that there is ample justification to dismiss the two questions on the basis that they are not questions of law befitting a reference under s. 42 of the Act. This is primarily due to the extensive finding of the arbitrator that the deposit sum was part of the expenses incurred by Dawama in the course of it preparing for the 2015 new title orders.

[72] The deposit sum was separate from the pre-press works costs incurred by Dawama. This was expressly stated by Dawama's key witness Dato' Norhisham in his witness statement. He was cross-examined extensively on this point. This has been the consistent stand of Dawama.

[73] To now contend that the arbitrator erred in its finding that the deposit sum was not part of *quantum meruit* is an attempt to re-litigate on DBP's part.

[74] DBP cannot adopt a dogged approach in putting its case as it did before the tribunal and continuing to do so before this court. It is clear to this court that DBP's position remains ie, the deposit sum cannot be part of *quantum meruit*. Dawama on the other hand contends otherwise but the issue has been addressed by the arbitrator on the evidence presented at the arbitral proceedings. Period.

[75] There is no question of law involved in the two questions raised and a discussion on this point would only duplicate the earlier discussion on *quantum meruit*. As such, Questions 12 and 13 merit no consideration.

Qestion 14: Whether The Arbitrator Erred In Law In Dismissing DBP's Claim For RM196,273.40 By Considering The Evidence And Submissions Relating To The Principles Of Mitigation Instead Of The Evidence Relevant To Proving The Claim, After Having Made A Finding That He Is Unable To Consider The Issue Of Mitigation Raised By Dawama And That Dawama Was Under A Legal Obligation Under The CA To Attend To Any Shortfall/Deficiencies To The Textbooks After The Expiry Of The CA

[76] This relates to DBP's claim for the replacement textbook claim. The Arbitrator had concluded that Dawama could not be blamed for not making the necessary replacements as it was not aware of the need to do so. This is coupled by the fact that in the past, when there was rejection of any textbooks, DBP would inform Dawama of the need to do so. In other words, it was DBP who usually forwards the complaints by the schools or distributors to Dawama.

[77] In considering this pleaded issue, the arbitrator found in para. 646 of the final award that "Dawama is obliged to supply the BCS 2015 books fully in accordance with the specifications of Kementerian Pelajaran Malaysia and it was obliged to also replace any shortfall or damaged textbooks to remedy its failure". The arbitrator further found in para. 647 of the final award that "counsel for DBP himself had suggested that the replacement is needed' and that "Zulkharnian bin Ismail agreed to the said suggestion". It is therefore DBP's case that the replacement of the alleged shortfall or damaged textbooks is needed.

[78] In finding that "Dawama is under a legal obligation under the CA to attend to any shortfall or deficiencies or damaged textbooks", the arbitrator also found in para. 659 of the final award that it is for DBP to forward any complains to Dawama and that it is reasonable to assume that Dawama would be unaware of any complains if DBP does not bring the same to the attention of Dawama. As rightly pointed out by the arbitrator, "if it is not brought to the attention of Dawama, how is Dawama expected to respond or take responsibility for the replacement textbooks".

[79] This court finds that there was an express finding by the arbitrator that "DBP never forwarded any complains to Dawama". It follows therefore, and as rightly found by the arbitrator at para. 661 of the final award, that DBP had not proven its claim under this head for it failed to prove that it had forwarded the relevant complaints from the schools and distributors to Dawama.

[80] The fact that the arbitrator was unable to consider the issue of mitigation raised by Dawama does not mean that he cannot consider the issue of whether DBP had proven that it had forwarded the complaints from the schools and distributors to Dawama. This is critical, for the arbitrator had found in para. 658 of the final award, in all the previous years, it was DBP who would first inform Dawama of any shortfalls or deficiencies so that Dawama could take the necessary action.

[81] In the circumstances, Question 14 does not lead to any issues that would vitiate the findings of the arbitrator.

Conclusion

[82] Based on the above analysis, it is the finding of this court that DBP has failed on both grounds of challenges. There was no issue of whether the final award should be set aside in entirety. Neither should the final award be set aside in part as there was no "new difference" as required in *Perwira Bintang* (*supra*) been established.

[83] Clearly DBP was nit-picking and looking for inconsistencies and faults in the said award. Such an approach is discouraged as a court should read the award in a reasonable and commercial way (see *Primera Maritime (Hellas) Ltd v. Jiangsu Eastern Heavy Industry Co Ltd* [2013] 2 CLC 901).

[84] The court must always be reminded that constant interference of arbitral award will defeat the spirit of the Act which for all intent and purposes is to promote one-stop adjudication in line with the international practice (see *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395; [2011] MLJU 1537; *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83; [2009] MLJU 793; and *Lesotho Highlands Development Authority v. Impregilo SpA And Others* [2005] UKHL 43). In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality and its advantage as an efficient alternative dispute resolution process should not be undermined (see *Jan De Nul* (*supra*)).

[85] The originating summons is therefore dismissed with costs.